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NO. 82-1292

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1982

SPRINGDALE SCHOOL DISTRICT NO. 50
OF WASHINGTON COUNTY ____ Petitioner

V.

SHERRY GRACE, A MINOR, AND ALBERT GRACE AND JOANN GRACE, INDIVIDUALLY AND AS PARENTS OF SHERRY GRACE

ARKANSAS STATE DEPARTMENT OF EDUCATION a/k/a DEPARTMENT OF EDUCATION; STATE BOARD OF EDUCATION; WAYNE HARTSFIELD AS CHAIRMAN OF THE STATE BOARD OF EDUCATION; MRS. JAMES W. CHESTNUTT, JIM DUPREE, T. C. COGBILL, JR., MRS. ALICE L. PRESTON, HARRY A. HAINES, DR. HARRY P. McDONALD, ROBERT L. NEWTON AND WALTER TURNBOW AS MEMBERS OF THE STATE BOARD OF EDUCATION; DON R. ROBERTS, DIRECTOR OF THE DEPARTMENT OF EDUCATION ____ Respondents

ON WRIT OF CERTIORARI TO
THE EIGHTH CIRCUIT COURT OF APPEALS

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION

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QC-83-7266 50 COPIES

QUESTIONS PRESENTED FOR REVIEW

1. Since there was no allegation that any of the Act's procedures were violated in formulating the IEP, did the court of appeals err in upholding the hearing officers' and district court's substitution of their opinions for those of the experts who developed the IEP?

2. Did the court of appeals err in holding that to educate a child in a one-on-one educational environment satisfies the "mainstreaming" requirements of the Education for All Handicapped Children Act and is an appropriate placement?

3. Whether the court of appeals erred by not properly applying the decision of this Court in *Rowley* insofar as it mandates that a handicapped child reasonably benefit from the instruction and services provided.

PARTIES TO THE PROCEEDINGS

The petitioner is Springdale School District No. 50 of Washington County, Arkansas, (hereinafter the "local educational agency" or "LEA").

The respondents are Sherry Grace (hereinafter "the handicapped child" or simply "the child") and the Arkansas State Department of Education and members of the State Board of Education (hereinafter the "state educational agency" or "SEA").

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IN THE

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OCTOBER TERM, 1982

SPRINGDALE SCHOOL DISTRICT NO. 50
OF WASHINGTON COUNTY ..... Petitioner

V.

SHERRY GRACE, A MINOR, AND ALBERT GRACE AND JOANN GRACE, INDIVIDUALLY AND AS PARENTS OF SHERRY GRACE

ARKANSAS STATE DEPARTMENT OF EDUCATION a/k/a DEPARTMENT OF EDUCATION; STATE BOARD OF EDUCATION; WAYNE HARTSFIELD AS CHAIRMAN OF THE STATE BOARD OF EDUCATION; MRS. JAMES W. CHESTNUTT, JIM DUPREE, T. C. COGBILL, JR., MRS. ALICE L. PRESTON, HARRY A. HAINES, DR. HARRY P. McDONALD, ROBERT L. NEWTON AND WALTER TURNBOW AS MEMBERS OF THE STATE BOARD OF EDUCATION; DON R. ROBERTS, DIRECTOR OF THE DEPARTMENT OF EDUCATION ..... Respondents

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ON WRIT OF CERTIORARI TO
THE EIGHTH CIRCUIT COURT OF APPEALS

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit appears in the "Official Reporter", at 693 F.2d 41 (November 8, 1982) and is reproduced in the Petition for Writ of Certiorari at A-1. The first opinion of the United States Court of Appeals for the Eighth Circuit is reported in the "Official Reporter" at 656 F.2d 300 (8th Cir. 1981) dated August 7, 1981, and appears in the Petition for Writ of Certiorari at A-8.

The opinion of the Honorable Paul X. Williams, United States District Judge for the Western District of Arkansas, Fayetteville Division, is reported in the "Official Reporter" at 494 F. Supp. 266 and appears in the Petition for Writ of Certiorari at page A-19.

The decision of the hearing officer at the due process hearing and the appeals officer on the administrative review, appear at page A-48 and A-41 respectively.

JURISDICTIONAL STATEMENT

The petitioner relies on 28 U.S.C. §1254(1) as the basis for this court's jurisdiction. Additionally, petitioner relies on Rule 17(c) of this Court governing jurisdiction on writ of certiorari which provides as follows:

> When a . . . federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this court, or has decided a federal question in a way in conflict with applicable decisions of this court.

The broad issues presented in this case which the petitioners request this court to review have been decided by this court in *Rowley v. Board of Education of Hendrick Hudson Central School District*, 458 U.S. ——, 102, S.Ct. 3034, 73 L.Ed. 2d 690 (June 28, 1982). There is no need for this court to consider the issues presented by the petition for writ of certiorari since the opinion of the Eighth Circuit Court of Appeals of November 8, 1982 (A-1) is consistent with the ruling of this Court. Further, the decision in this case is not in conflict with decisions in any other circuit court of appeals.

APPLICABLE CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

The petitioner has adequately set forth the applicable statutory and regulatory provisions of the Education for All Handicapped Children Act, 20 U.S.C. §1401 et seq. The only constitutional provision involved is the equal protection clause of the Fourteenth Amendment. Section 3(c) of the P.L. 94-142 (the Education for All Handicapped Children Act) which states the purpose of the Act is set out in respondent's Appendix "B". In addition §504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 is involved and is set out in respondent's Appendix "C".

STATEMENT OF CASE

Sherry Grace is an eleven year old deaf child. Her education began with her enrollment in a preschool program conducted by the Fayetteville Public Schools at Bates Elementary. The Bates program was established to educate hearing impaired children in an oral program. Sherry remained in the Bates half-day program for two years. When she became six years old, the officials at Bates referred her to the Arkansas School for the Deaf in Little Rock, two hundred miles southeast of her home in Springdale, Arkansas.

Because she was so young, Sherry's parents left Springdale and moved with Sherry to Little Rock where she enrolled as a day student in the lower school program of the Arkansas School for the Deaf (hereinafter called ASD). The ASD employs a total communication method of educating hearing impaired children.

Through evaluation, it was determined that Sherry Grace's degree of impairment was such that she requires

the total communication method of education. Sherry progressed from her initial placement in the pre-school level at ASD through the second elementary level.

After their third year in Little Rock, the Grace family decided that they could not, either emotionally or financially, endure life in Little Rock any longer. When the Graces learned of their right to have Sherry educated with non-handicapped children under the Education for All Handicapped Children Act of 1975 they moved back to Springdale and petitioned the local school to provide a free and appropriate education for Sherry.

Sherry Grace was evaluated and an individualized education plan (IEP) was established for her. The IEP showed that Sherry needs a trained teacher of the deaf as well as related services of speech therapy and audiology training. It also shows her need for a total communication method of education. The school district determined that the ASD was the only place which could provide the services Sherry needed. The IEP also provides that Sherry will have PE and library with the regular fourth grade students. There are no "regular fourth grade students" at ASD, all of its students being hearing impaired.

The parents protested that the ASD was not the proper placement and that Sherry should be educated near her home in Springdale. A due process hearing was held, after which the impartial hearing officer determined that the ASD was not the proper placement for Sherry.

The school district appealed to the state level, after which the appeals officer determined that Sherry should be educated in close proximity to her home, possibly in a regional program, to allow her to travel back and forth on a daily basis.

The school district appealed to the U. S. District Court and a two-day hearing was held on May 8-9, 1980.

Jurisdiction of the district court was invoked pursuant to 20 U.S.C. §1415(e)(2). The judgment of the district court entered on July 25, 1980 was that the decision of the Arkansas Department of Education with respect to the IEP developed for the 1979-80 school term for Sherry Grace should be affirmed. The district court ordered and enjoined the plaintiff school district to provide Sherry Grace with a certified teacher of the deaf for the 1980-81 school term.

In its memorandum opinion the district court found that the Act requires the school to provide Sherry Grace with a free appropriate education and adopted the definition of "appropriate education" developed by the district court in *Rowley v. Board of Education,* 483 F. Supp. 528 (S.D. N.Y. 1980), *aff'd* 3 EHLR 552.101 (2nd Cir. 1980), *cert. granted* 50 LW 3334 (Nov. 3, 1981, which standard "requires that each handicapped child be given an opportunity to achieve his full potential commensurate with the opportunity provided to other children". The court found that nonhandicapped children in Springdale schools are provided the opportunity to learn language skills, reading, writing, arithmetic, social studies and science. Sherry Grace's IEP calls for instruction from a certified teacher for the deaf in manual communication (language skills), lipreading, writing and speaking. Instruction in reading, arithmetic, spelling, telling time, handwriting, health, social sciences and art would be provided by the certified teacher.

The court concluded that Sherry can receive an appropriate education at both the Springdale School and the ASD. The court found that 20 U.S.C. §1412(5)(B) requires the child to be educated with nonhandicapped children to

the extent consistent with the child's receiving an appropriate education. Since the Springdale school can provide an appropriate education and can also meet the mainstreaming requirements of the Act, the court held that the Arkansas Department of Education's modification of the IEP was correct.

The school district appealed the district court's decision to the U. S. Court of Appeals for the Eighth Circuit. On August 7, 1981, the Court of Appeals affirmed the district court's decision that Springdale School District could provide Sherry Grace with a free appropriate education. *Springdale Sch. Dist. v. Grace, et al,* 656 F.2d 300, 302 (8th Cir. 1981). By affirming the district court's adoption of the *Rowley* standard the Court of Appeals assured that its decision is in keeping with this Court's decision in *Brown v. Bd. of Ed.,* 347 U.S. 483 (1954) to guarantee equal protection in education to all children. In addition, the decision is supported by the mainstreaming requirements of the Act that to the maximum extent possible "without sacrificing the child's right to an appropriate education, the handicapped must be educated with the nonhandicapped". 656 F.2d at 305. Finally, the decision is in keeping with §504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, which prohibits discrimination solely on the basis of handicap.

The decision below is in conformity with decisions of the Second and Third Circuit Courts of Appeal, the only other Circuits which have decided the issue of appropriateness in handicap education.

This Court has rendered its opinion in *Board of Education of Hendricks Hudson Central School District v. Rowley,* 458 U.S. ——, 102 S.Ct. 3034, 73 L.Ed. 2d 690 (1982). This Court granted certiorari in this case for the purpose of

having the Eighth Circuit Court of Appeals set out its findings in this instant case consistent with this Court's decision in *Rowley. Vac.* —— *v.* ——, 102 S.Ct. 3504 (1982). The opinion in the *Rowley* case has been more specifically interpreted and applied to the instant case by the Eighth Circuit Court of Appeals. 693 F.2d 41 (1982) (Opinion found on Appendix "A" of the Petition for Writ of Certiorari) The opinion of the Eighth Circuit is clear, unambiguous and consistent with the *Rowley* decision and is consistent with other decisions similarly held by other circuits. It is therefore unnecessary for this Court to grant certiorari in this case.

REASONS FOR DENYING THE WRIT

I.

SINCE THERE WAS NO ALLEGATION THAT ANY OF THE ACT'S PROCEDURES WERE VIOLATED IN FORMULATING THE IEP, DID THE COURT OF APPEALS ERR IN UPHOLDING THE HEARING OFFICERS' AND DISTRICT COURT'S SUBSTITUTION OF THEIR OPINIONS FOR THOSE OF THE EXPERTS WHO DEVELOPED THE IEP?

The Eighth Circuit Court of Appeals in their opinion of November 8, 1982, in this case, followed the directive of this Court as set out in *Board of Education of Hendrick Hudson School District v. Rowley,* 458 U.S. —— (1982) by upholding the results of the administrative procedures required by the Education of All Handicapped Children Act, 20 U.S.C. §1401 et seq. That is to say the educational decision developed through the administrative process should be maintained and upheld if it is reasonably calculated to enable the handicapped child to receive educational benefits.

The petitioners argue that not only should the courts not substitute their opinions of what is best educationally for the handicapped child, but also the hearing officers and the appellate review officers at the administrative process should not substitute their opinions on what is best educationally for the handicapped student. This rationale propounded by the petitioners would in effect totally gut the due process procedures and protections of the Act as set forth in 20 U.S.C. §1415. The procedural safeguards outlined in 20 U.S.C. §1415, unequivocally provide the right of a handicapped student to have an IEP conference for the

purpose of the identification, evaluation, and educational placement of the handicapped child with participation by parents and other appropriate educators. The IEP conferences sui generis are conducted and influenced by the local educational agency that will be required to pay for the implementation of the education plan for the handicapped student and the placement of the handicapped student. Therefore, what the petitioner argues to this court would be to permit the decision of the participants at the IEP conference to stand without review from any source notwithstanding some error in procedural rights as set out in the Act. This certainly could not be the legislative intent of Congress to permit such unfettered discretion to be left with the participants of the IEP conference dominated and controlled by the local educational agency responsible for the payment of the educational plan of the student. Indeed, 20 U.S.C. §1415(b)(2) requires:

> "Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the state educational agency or by the local educational agency or intermediate educational unit, as determined by state law or by the state educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child". (A-100)

The issue in this case involves only the placement of Sherry Grace. The participants in the IEP conference all agreed to the educational plan Sherry Grace needs. The

only dispute, of course, involves whether she be educated in the Springdale School District system where her home is, or the Arkansas School for the Deaf, in Little Rock, Arkansas.

The main concern of the petitioners is quite obvious and riddled throughout their petition, that costs is the sole and only concern that they have. The hearing officer made this observation wherein he states in his opinion:

> "The hearing officer's interpretation of the law differs from the respondent (School District) in that the hearing officer's interpretation is that currently available placement options and programs do not dictate placement decision for this child." (A-62)

The reviewing officer in his review decision made a similar observation where he states:

> "Evidence found in the transcript of the due process hearing suggest that the continuum of alternative placements was not considered in making the initial placement decision early in the 1979-80 school year. The absence of an existing local education program using the child's mode of communication is not sufficient justification to select placement on the more restrictive end of the continuum before providing appropriate education in a lesser restrictive environment." (A-47)

Additionally, the Eighth Circuit Court of Appeals made a similar statement in its opinion of November 8, 1982, when the Court made the specific statement and finding:

> "The costs to the school or the judgment of local authorities do not justify the intervention of this Court to place Sherry elsewhere when the mainstreaming provisions of the Act in the judgment of the State's administrative decision makers — support a finding that the Springdale School can provide a 'free appropriate public education' consistent with the Act." (A-6)

Notwithstanding the continuous findings of all of the individuals that have reviewed this case and the judicial opinions finding that costs to the local educational agency is not a determining factor in the placement of the child, the petitioners continue to persist that costs should be a determining factor.

Additionally, the petitioners criticize the administrative process and review and proffer to this court that the hearing officer's opinion and review and the reviewing officer's opinion and review are inadequate and provide lack of understanding of their duties as reviewing officers and the understanding of the educational needs of this handicapped child. (A-11) To the contrary, the respondents submit to this Court that extreme detail was given to this case by both individuals. The hearing officer visited the Arkansas School for the Deaf to obtain additional background (A-62) and the reviewing officer attended the Arkansas School for the Deaf, made telephone inquiries to other states and made an on-site inspection of the hearing impaired educational program at Hot Springs School District (A-44). It cannot be rationally argued by the petitioners that the entire educational needs and careful and thoughtful consideration of Sherry Grace's placement were not provided through the administrative process in the State of Arkansas.

The petitioner's argument in paragraph one of their petition is therefore absurd. They argue for this Court to judicially limit a handicapped student's due process procedures as outlined by Congress.

II.

DID THE COURT OF APPEALS ERR IN HOLDING THAT TO EDUCATE A CHILD IN A ONE-ON-ONE EDUCATIONAL ENVIRONMENT SATISFIES THE "MAINSTREAMING" REQUIREMENTS OF THE EDUCATION FOR ALL HANDICAPPED CHILDREN ACT AND IS AN APPROPRIATE PLACEMENT?

The petitioners and respondents agree to the assessment of Sherry Grace's needs as outlined in her IEP, that she needs the total communication method of instruction to be taught by a certified teacher for the deaf. The real controversy arises in the discussion of placement in fulfilling the requirements of the individualized education plan. What is overlooked by the petitioners in their arguments in the lower court and in this Court is that academic considerations are not the sole considerations to be made in the placement of a child in the correct educational environment. The choices that have been made available throughout this litigation are for Sherry Grace to be educated at the Arkansas School for the Deaf, 200 miles from her home in a residential institution versus being placed in a program at the Springdale School where she otherwise would be educated notwithstanding her handicap. All parties agree and the courts have held that Sherry Grace would be educated by a trained certified teacher for the deaf in whatever educational environment she were placed. (A-16, A-36)

The courts also noted that it is an improper comparison to say that Sherry Grace has not progressed while attending the Springdale School since her initial placement did not include a certified teacher for the deaf as required in her IEP. (A-11, A-37)

The trilogy of concepts that holds the Education For All Handicapped Children Act together include (1) that it is assumed a continuum of placement are available to meet each handicapped child's need for special education, (2) that mainstreaming will occur in the least restrictive environment, and (3) that the educational placement would be as close as possible to the child's home. All three concepts need to be considered together not to the exclusion of any. The most significant concept of the three for Sherry Grace involves her sociological and emotional needs in being with her family. Both lower courts recognize this crucial need and refuse to ignore such an important need in the development of the proper placement for Sherry Grace in the fulfillment of her educational needs.

Judge Williams in the District Court opinion puts it as follows:

> "But the Springdale School does not turn every one of its students into academicians or professionals, or even successful secondary school students. The home life of the child, his parents' interest and the child's cultural and sociological environment often determine the child's academic success and attainment or lack of such". (A-34)

The Appellate Court stated it as follows:

> "The fact that Sherry may not, like many non-handicapped children, reach her full potential is

> not due to any error in the District Court's interpretation of the Act or its finding that the Springdale School could appropriately educate Sherry, but instead may well result in the forces outside the school environment. The Act cannot remedy a child's cultural or sociological environment nor force parents, by threatening to remove the child from the home to become partners with the State in insuring that a child reach her full potential". (A-16)

The Appellate Court goes on to say:

> "At the School for the Deaf, however, Sherry would have virtually no contact with nonhandicapped children. This goes against the backbone of the Act which is to keep handicapped children out of institutions where they often are no more than prisoners serving life terms". (A-17)

It is therefore the position of the respondents that the petitioners totally ignore the crucial facts that the District Court and Appellate Court refused to ignore; that is, there is more to defining "an appropriate education" than just determining where the best academic exposure can be. There are numerous trade-offs in life. Sherry Grace and her family are no exception. The Grace family's position is well supported in the testimony before the District Court, that the only placement feasible for Sherry Grace emotionally and sociologically is at the Springdale School where she can be with her mother, father, and family. The family and Sherry strongly oppose being institutionalized at the Arkansas School for the Deaf as a residential student.

The School District therefore must insure that a continuum of alternative placements is available pursuant to

45 C.F.R. §121a.550. Since this can be done at the Springdale School, the School District must insure that the educational placement is as close as possible to Sherry Grace's home. 45 C.F.R. §121a.552(a)(3). The School District is obligated by regulation to give consideration to any potential harmful effect on the child in selecting the least restrictive environment. 45 C.F.R. §121a.552(d). The respondents submit that the School District refuses to consider the harmful effects that a residential school would have on Sherry Grace. (A-157)

The petitioners attempt to argue that the "mainstreaming" mandates of this Act are not being provided because of the type of education Sherry Grace receives at the Springdale School. As indicated above, and pointed out by the courts, the Springdale School District was not providing the required and appropriate education as set out in the IEP until ordered by the district court. The petitioners attempt to highlight and cite testimony of various witnesses that was presented prior to the district court's order and prior to the school district's implementation of the appropriate education for Sherry Grace.

In essence the reviewing officer sets it out in the most concise and appropriate language as follows:

> "While the Appellant's (Springdale School District) arguments against local education for the child based on the potential social and communicative isolation are compelling, experience in other locations suggest that a child with a profound hearing loss can develop socially and can communicate sufficiently with others if appropriate program and environmental modifications are made." (A-47)

The reviewing officer and the courts have seen through the facade argued by the petitioners that Sherry Grace cannot appropriately be educated in the Springdale school system.

If this court will deny the Petition for Writ of Certiorari it will reaffirm that Sherry Grace is in fact getting an appropriate education as defined by this Act. Further, what is an appropriate education based on the factual issues of this case for Sherry Grace is not an appropriate or valid reason for this court to grant the Petition for Writ of Certiorari since the opinion and result in the case are consistent with this Court's opinion in *Rowley*.

III.

WHETHER THE COURT OF APPEALS ERRED BY NOT PROPERLY APPLYING THE DECISION OF THIS COURT IN *ROWLEY* INSOFAR AS IT MANDATES THAT A HANDICAPPED CHILD REASONABLY BENEFIT FROM THE INSTRUCTION AND SERVICES PROVIDED.

The third argument of the petitioner is one of arguing costs. The court of appeals succinctly answered this argument by stating at page A-6 of the Petition for Writ of Certiorari as follows:

> "The costs to the school or the judgment of local authorities do not justify the intervention of this court to place Sherry elsewhere when the mainstreaming provisions of the Act in the judgment of the State's administrative decision makers support a finding that the Springdale School can provide a free appropriate public education consistent with the Act."

The State of Arkansas has made a policy decision to participate in receiving the funding appropriated through the Education For All Handicapped Children's Act and have therefore implemented a state plan required to be complied with and implemented by all local educational agencies including the Springdale School District. It is frivolous and uneventful for the Springdale School District to argue costs. The respondents, the State Department of Education, has made a commitment to implement these types of programs in the State of Arkansas. Costs should not be a concern to the Springdale School District since the judicial opinions have consistently held that costs cannot be a consideration when determining what is an appropriate education and placement for a handicapped child under this Act. Additionally, the State Department of Education by implementing the Arkansas State Plan for Educating Handicapped Children is committed to the implementation and operation of regional programs for handicapped students. The Springdale School District therefore has no standing or right to question the costs of educating this child in an appropriate education for those reasons.

CONCLUSION

The respondents submit that the opinion of the Eighth Circuit Court of Appeals rendered November 2, 1982, complies in total with this Court's ruling in *Rowley*. Since no inconsistency exists with the *Rowley* opinion in the Eighth Circuit Court of Appeals opinion or any other circuit, granting this Petition for Writ of Certiorari is not necessary. No important question of federal law need be decided by the request of the petitioner. The placement of Sherry Grace and the implementation of her educational program

with the Springdale School District has been continuously and consistently upheld by every reviewing officer or judicial body to date. The due process and administrative process through the State of Arkansas in determining the proper placement of Sherry Grace has been complete, thorough, and well opinioned. All questions of methodology for the educating of Sherry Grace has been set out through the administrative procedure in the State of Arkansas.

The equal protection standard used by the Eighth Circuit Court of Appeals to define appropriate education is in keeping with this Court's decisions concerning equal protection in education. There is no conflict among the circuits applying the equal protection standard. For these reasons a review by this Court is unnecessary.

Respectfully submitted,

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APPENDICES

APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

U.S. COURT & CUSTOM HOUSE
1114 MARKET STREET
ST. LOUIS, MISSOURI 63101

October 2, 1981

Mr. James M. Roy, Jr.
Mr. Stephen M. Sharum
Ms. Nelwyn Davis
Mr. Seymour DuBow
Hon. Paul X. Williams, Chief Judge
Mr. Pat L. Graham, Jr., Clerk
Ms. Sheryl Dicker
West Publishing Co.
Commerce Clearing House
National Center for Automated Information Retrieval
Prentice Hall, Inc.
Bureau of National Affairs

Re: 80-1777 Springdale School Dist., etc. v. Sherry Grace, etc., et al

Dear Sirs:

Enclosed herewith please find copy of an order entered by us today at the direction of the Court.

Sincerely,

/s/ Robert D. St. Vrain
Clerk of Court

lkl

cc: Hon. Gerald W. Heaney
Hon. J. Smith Henley
Hon. Fred J. Nichol, Chief Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

SEPTEMBER TERM, 1981

No. 80-1777

SPRINGDALE SCHOOL DISTRICT No. 50 OF
WASHINGTON COUNTY ..... *Appellant*

VS.

SHERRY GRACE, ETC., ET AL ..... *Appellees*

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
WESTERN DISTRICT OF ARKANSAS

On the Court's own motion it is now here ordered that the opinion previously filed on August 7, 1981 be, and it is hereby, amended by the substitution of the attached page 9.

October 2, 1981

[The original page 9 begins on A-9 through A-10 in the Petition for Writ of Certiorari.]

of the Act require that "to the maximum extent" possible, without sacrificing the child's right to an appropriate education, the handicapped must be educated with the non-handicapped. The regulations required that the handicapped child not only be educated as close to home as possible, but also that when possible the child should be educated in the school which he or she would attend if not handicapped.[8]

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[8] 45 C.F.R. section 121a.513(b) provides that
Each public agency shall insure:
(1) That to the maximum extent appropriate, handicapped children, . . . are educated with children who are not handicapped. . . .

(Continued on page A-3)

At the Springdale School Sherry would be with nonhandicapped children for physical education, library, and possibly penmanship, science, health, social studies, music and art. At the School for the Deaf, however, Sherry would have virtually no contact with nonhandicapped children. Although Sherry's case does appear

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45 C.F.R. section 121a.551 provides assurance that

> (a) Each handicapped child's educational placement:
> (1) Is determined at least annually;
> (2) Is based on his or her individualized education program, and
> (3) Is as close as possible to the child's home; . . .
> (c) Unless a handicapped child's individualized education program requires some other arrangement, the child is educated in the school which he or she would attend if not handicapped.
> . . .

The only exception to the above requirements is "when the nature of or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 20 U.S.C. section 1412(5)(B); 45 C.F.R. section 121a.513(b)(2). Since we hold that Sherry can, with the use of supplemental services, receive an appropriate education at the Springdale School the above exception would be inapplicable.

APPENDIX "B"

HISTORICAL NOTE TO 20 U.S.C. §1401

Short Title; Congressional Findings; Congressional Declaration of Purpose. P.L. 91-230, §601, as amended by P.L. 94-142, §3(a), provided that:

* * *

"(c) It is the purpose of this Act [this chapter] to assure that all handicapped children have available to them, within the time periods specified in section 612(2)(B) [section 1412(2)(B) of this title], a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected, to assist States and localities to provide for the education of all handicapped children, and to assess and assure the effectiveness of efforts to educate handicapped children."

APPENDIX "C"

Rehabilitation Act of 1973, §504

29 U.S.C. §794. Nondiscrimination under Federal Grants and Programs.

> No otherwise qualified handicapped individual in the United States, as defined in section 706(6) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

Pub. L. 93-112, Title V, §504, Sept. 26, 1973, 87 Stat. 394; amended Pub. L. 95-602, Title I, §119, Nov. 9, 1978, 92 Stat. 2982.